Supreme Court, U.S.
FILED
JUN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1643

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

GORDON STRUBE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## REPLY MEMORANDUM

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## TABLE OF AUTHORITIES


| **Cases:** | Page |
|---|---|
| *Santobello* v. *New York*, 404 U.S. 257 (1971) ..... | *passim* |
| *United States* v. *Bullock*, 725 F.2d 118 (D.C. Cir. 1984) ..... | 4,5 |
| *United States* v. *Januszewski*, 777 F.2d 108 (2d Cir. 1985) ..... | 5 |
| *United States* v. *Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989) ..... | 6 |
| **Statutes and Rules:** | |
| 18 U.S.C. § 3 ..... | 7,8 |
| Fed. R. Crim. P. 32(d) ..... | 2,6 |

## REPLY MEMORANDUM

The arguments advanced by the Government, like petitioner's conviction, do violence to this Court's jurisprudence, to ordered justice, and to the English language. The Government does not dispute that the decision below cannot be reconciled with multiple decisions of other Circuits or that the questions presented are frequently recurring. Certiorari should be granted to resolve these inter-circuit conflicts and to affirm the continuing vitality of *Santobello* v. *New York*, 404 U.S. 257 (1971). In the alternative, the conviction should be summarily vacated so that this 71 year old petitioner can put the Government to its proof at a trial under an indictment or information that actually charges an offense against the laws of the United States.

1. As in the Court of Appeals, the Government does not expressly disavow in this Court its use of the phraseology "at least one year" in the sentencing memorandum by which it transmitted to the District Court the very signal which, in the plea bargaining process, it had solemnly promised not to send. Nor does the Government suggest that that phraseology means anything other than what petitioner contends.[1] Instead, the Government defends the use of such language by the AUSA below and, by clear implication, the use of similar language by prosecutors in the

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[1] Perhaps to make the Court believe that this illicit signal was not received by the District Court, the Government insists that petitioner was sentenced "to six months custody in a community treatment center," Br. in Opp., at 2; the Government nowhere acknowledges that petitioner was in fact sentenced to two years of imprisonment and that its illicit signal was therefore heard and, on the face of it, acted upon by the District Court.

literally thousands of criminal cases which are disposed of each year by plea bargains. As the Government insists, the "prosecutor did not concede that the sentencing memorandum breached the plea agreement. . . ." Br. in Opp., at 9-10. The Government's defense of the AUSA's actions in this Court, however, has ramifications far beyond this case.

Refusing to acknowledge this plain error, the Government takes the Court on a journey into the mind of the sentencing judge. Thus, "it would have been unreasonable for the district court to conclude from the [sentencing] memorandum as a whole that the government was recommending more than one year's incarceration," Br. in Opp., at 8, and "the district court was well aware that petitioner's plea obligated the government not to 'recommend at the time of sentencing a total period of incarceration of more than one year.' " *Id.* Indeed, the Court is told to take comfort because petitioner was assertedly "sentenc[ed] by a judge who understood that the government was recommending no more than one year of incarceration." *Id.*, at 10. The Government's position is wide of the mark in two related and critical respects.

First, the Government's snapshot of the District Court's state of mind is drawn from information which reached that court *after* petitioner had moved to withdraw his guilty plea. If, as the Government otherwise insists, the AUSA "did not seek to cure any . . . breach" of the plea agreement, Br. in Opp., at 10, then all the information communicated by the Government to the sentencing court after the filing of petitioner's Rule 32(d) motion and relied upon extensively by the Government in its opposition to that

motion and in this Court was and is irrelevant to the point at issue. Either there was a breach of the plea agreement upon submission of the Government's sentencing memorandum or there was, as the Government asserts, no breach at all and therefore nothing to "cure." Other than the language of the sentencing memorandum itself, no surer evidence of the Government's violation of the plea agreement is available than the AUSA's attempts at the sentencing hearing to recall the breaching language—attempts recounted in full by the Government in this Court for no apparent reason other than to persuade the Court that the AUSA was, after all, well-intentioned. The sentencing memorandum is, however, the best evidence of the Government's intent.

Second, and as petitioner has previously demonstrated, Pet., at 18-20, the irreducible teaching of *Santobello* v. *New York*—which the Government neither cites nor attempts to distinguish—is that a guilty plea cannot stand where its only foundation is conjecture regarding how the sentencing judge may have been affected by the prosecutor's illicit sentencing recommendation.[2] *Santobello* fashioned a broad, pro-

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[2] The Government seeks refuge in the fact that the "Introduction" to the sentencing memorandum stated that the Government was recommending "[a] jail sentence of one year for petitioner." Br. in Opp., at 8. Under the Government's logic, a sentencing memorandum which had later recommended a sentence of "at least two years"—precisely the sentence imposed in this case—would be equally invulnerable to challenge. It is apparently the Government's position that so long as the AUSA gets it right at some point in the sentencing memorandum, it makes no difference that elsewhere he got it wrong. It is absurd to suggest that any defendant would ever plea bargain with the Government if the Government's cavalier view

phylactic rule—never since questioned by this Court—under which the Government must keep its promises irrespective of whether its failure to do so may have had, in retrospect, an impact on the sentence imposed by the sentencing court.

Without denying that the decision below cannot be reconciled with decisions of the Third, Fifth, Seventh and Eleventh Circuits discussed in the Petition, at 14-17, the Government counters that the decision below *is* consistent with decisions of the Second, Fourth, Eighth and D.C. Circuits, Br. in Opp., at 10-11. Nowhere does the Government explain to the Court why such a recurring question is not worthy of plenary consideration where four Circuits would have sustained petitioner's challenge while five Circuits would, at least according to the Government, not do so. It is apparent that the Government asserts the right to make sentencing recommendations in its sentencing memoranda in plea bargain cases which are manifestly not in literal compliance with the promises made by the Government in the underlying plea agreements. In asserting this extraordinary right in this Court, the Government, Br. in Opp., at 10, relies upon cases such as *United States* v. *Bullock*, 725 F.2d 118 (D.C. Cir. 1984) (per curiam), in which the same "at least" phraseology was used by the Government in its sentencing memorandum. What the Government fails to point out is that while the *Bullock* court upheld the denial of the defendant's *post-sentencing* motion to withdraw his guilty plea, the Court of Appeals expressly "admonish[ed] the government to avoid oc-

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of its obligations as stated to this Court was disclosed to defendants in advance.

casions for questioning its meticulous adherence to the terms of a plea bargain." *Id.*, at 119.

In *Bullock*, the Court of Appeals accepted the teaching of *Santobello*, noted the District Court's finding of probable prejudice to the Government in allowing withdrawal of the guilty plea, and told the Government to avoid such mistakes in the future. 725 F.2d, at 119. By relying on *Bullock*, the Government asks this Court to sanction a practice condemned by *Bullock* and at least one other case relied upon by the Government[3] and to do so in the absence of any finding by the courts below of prejudice to the Government in a case in which the defendant asserted his innocence prior to sentencing and demanded that the Government be put to its proof at trial. Were the Court to accept the Government's invitation by denying review of this case, the Government may be expected to continue its evidently widespread practice of systematically ignoring *Santobello*.

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[3] As in *Bullock*, the Second Circuit affirmed the defendant's conviction in *United States* v. *Januszewski*, 777 F.2d 108 (2d Cir. 1985), another case relied upon by the Government, Br. in Opp., at 10, only after it had found that the Government's use of the phrase "nothing less than six years" in its oral argument at the sentencing hearing "violated the spirit of the plea agreement." *Id.*, at 110. The Second Circuit went on to criticize the AUSA for giving "inadequate consideration of the extent of the government's obligations under the [plea] agreement." *Id.*, at 111. *Bullock* and *Januszewski* appear to stand for nothing more than the proposition that the Courts of Appeals are willing to tolerate violations of *Santobello* under the false impression that the Government will respond to their criticism of its failure scrupulously to implement *Santobello* in particular cases. The Government's position in the case at bar in this Court is testimony to the fact that it has no intention of reining in its prosecutors and directing them in no uncertain terms to comply with *Santobello*.

The Government also contends in a footnote, Br. in Opp., at 11 n.3, that, even if the District Court erred in finding that the plea bargain had not been breached, this Court need not be concerned because the appropriate remedy was for the District Court to choose and that court stated in dictum that resentencing—not withdrawal of petitioner's guilty plea—was the appropriate remedy for the breach.[4] But as petitioner demonstrates, Pet., at 18-22, the Due Process Clause as interpreted in *Santobello* requires that a defendant be allowed to withdraw his guilty plea in such circumstances, at least in the absence of a showing by the Government of substantial prejudice.[5]

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[4] In footnote 3 of its opposition, the Government cites *United States* v. *Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989), in support of its argument that the appropriate remedy is within the discretion of the District Court. In that case, the defendant specifically requested resentencing before a different judge rather than withdrawal of his guilty plea. In any event, the point is not that district courts have some discretion in providing a remedy for the Government's breach of a plea agreement. The point is whether *Santobello* established a presumption in favor of the remedy chosen by the defendant absent a showing of substantial prejudice by the Government. In this case, the District Court never exercised whatever discretion it possessed on this issue because it erroneously found that the plea agreement had not been breached.

[5] Unlike its position in the courts below, the Government does not argue in this Court that allowing petitioner to withdraw his plea on the basis of his Rule 32(d) motion would have prejudiced the Government. This omission by the Government is apparently an attempt to avoid paying even lip service to the Court's decision in *Santobello*, which the Government rather plainly does not accept but which the Government declines to challenge forthrightly. If the Court does not intervene in this case, the Government will undoubtedly continue its policy of ignoring *Santobello* and the warnings of the Courts of Appeals (such as the *Bullock* court). The plea bargain process is too

Once again the Government's position evidences an open disregard for *Santobello* and an intent to flout its teaching unless and until this Court intervenes. The Government overreaches, and does so in an area of the criminal justice system which has been nurtured by this Court as one deserving of special protection because of the enormous power exercised by the Government in the plea bargaining process and the importance of ensuring the workability of the plea bargaining system.

2. The Government's argument that the three counts of the criminal information to which petitioner pleaded charged an offense for which he (or any other person) could have been convicted is based solely on the presence in the three counts of the phrase "knowing that the offense *had been committed*," Br. in Opp., at 12 (emphasis the Government's). That phraseology, however, does nothing more than establish petitioner's *intent*, an element the Government must establish in order to obtain a conviction under 18 U.S.C. § 3. The question petitioner has raised is the entirely different one whether the information charges acts occurring *after* the underlying offenses upon which petitioner's conviction may be sustained. An examination of the information demonstrates that it does not charge such acts and that it is therefore fatally defective.

The three counts for which petitioner was convicted parallel one another, each consisting of two paragraphs. *See* Pet. App., at 35a, 36a, 37a. The first paragraph of each count describes the acts committed

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central to the efficient administration of the criminal justice system to be left unattended by this Court under the circumstances presented by this case, especially given the position taken by the Government.

by the other defendants—not petitioner—and states that these acts occurred "[o]n or about" certain dates. Petitioner does not suggest—as the Government implies, Br. in Opp., at 13 n.5—that some variance between these alleged dates and the actual dates on which the *underlying* offenses were committed could require reversal of *his* conviction. Rather, petitioner's contention is that the fatal defect in the information is that in each of the second paragraphs of the three pertinent counts, the information charges petitioner with violating 18 U.S.C. § 3 on the basis of acts alleged to have occurred "[a]t said time"—the same time—as the underlying offenses. No matter what date might have been plugged into the first paragraph of the three counts, the result is the same: the information charged petitioner with acts taken *at the same time as* the underlying crimes were committed by the principals. Contrary to the Government's assertion in its footnote 5, this timing is critical because it is simply impossible to be an accessory after the fact on the basis of acts committed simultaneously with the underlying substantive offenses.

3. *Conclusion.* Given the implications of *Santobello* v. *New York* for this case, the Government's refusal to explain to the Court where it stands with regard to *Santobello*'s requirements is telling. This is not just another case on this Court's docket in which a rule has been broken, an injustice done. It is, rather, irrefutable evidence that the Government regards itself as unconstrained by the holding of *Santobello* and is confident that the understandable reluctance of the Courts of Appeals to disturb convictions based upon guilty pleas will make the price of the Government's systematic intransigence low enough to be tolerable

over the long term. Petitioner has been deprived of his right to put the Government to its proof at trial, as cherished a right as exists in our criminal justice system. The prosecutorial policy which led to this denial should be subjected to plenary review by this Court.

June 12, 1990

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